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IN THE

Supreme Court of the United States

October Term, 1953
No. 398

CAPITAL SERVICE, INC., a California corporation, doing business under the fictitious firm name and style of DANISH MAID BAKERY, and G. BRASHEARS, individually and as president of said corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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SUBJECT INDEX

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IN THE

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The Petitioners herein, Capital Service, Inc., and G. Brashears, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a decision of the District Court of the United States for the Southern District of California, Central Division.

Jurisdiction.

Respondent alleges that this action arises under the National Labor Relations Act, as amended, 29 U. S. C., Supp. IV, Section 151, *et seq.*, hereinafter called "the Act," an Act of Congress regulating interstate commerce. The jurisdiction of the Federal District Court is invoked by Respondent under Section 1337 of the Judicial Code, 28 U. S. C., Supp. IV, and under Section 1651 of the Judicial Code, 28 U. S. C., Supp. IV.

Jurisdiction is conferred upon the United States Court of Appeals under the provisions of Section 1292 of the Judicial Code, 28 U. S. C., Supp. IV, which authorizes an appeal from an interlocutory order of the District Court of the United States granting an injunction.

Judgment of the United States Court of Appeals was entered on January 30, 1953. A petition for rehearing was filed by Respondent on March 2, 1953. Judgment, as amended on rehearing, was entered on May 12, 1953. The case is reported at 204 F. 2d 848.

On August 3, 1953, Justice Clark of the Supreme Court of the United States made and entered an order extending the time for filing this Petition for Writ of Certiorari to and including October 9, 1953.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, 28 U. S. C., Supp. IV, and Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States.

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Statutes Involved.

The statute involved is the Labor-Management Relations Act of 1947, 29 U. S. C., Supp. IV, Section 151, *et seq.*, hereinafter called "the Act," which amends the National Labor Relations Act, and prescribes the rights and duties of employees, labor organizations and employers in their relations affecting commerce. Petitioners ask leave to refrain from reprinting at this point the numerous provisions of the Act which bear on the argument on the merits.

Statement of the Case.

Petitioners manufacture bakery products in a non-union plant under the firm name and style of Danish Maid Bakery, and sell them to retail dealers in and around Los Angeles, California. During 1951, Capital Service, Inc., hereinafter called "Service," made purchases totaling approximately $500,000. Of this amount, $30,000 was received directly from sources outside California, and $175,000 was received indirectly from sources outside California. Thriftymart, Boys Valley Market No. 4 and Valley Stores No. 1 and No. 2 are retail food markets located in Los Angeles, California, which sell the bakery products of Service. In 1951 Thriftymart received merchandise directly from sources outside California valued at approximately $300,000. In the same year Boys Valley Market No. 4 received directly from sources outside California merchandise valued at approximately $800,000, and $1,000,000 indirectly from sources outside of Cali-

fornia. In 1951, Valley Stores No. 1 and No. 2 received merchandise which originated from sources outside California valued at approximately $250,000.

On April 14, 1949, a consent election was conducted by the National Labor Relations Board for the purpose of determining whether or not the production and maintenance employees of Service desired to be represented for the purpose of collective bargaining by Bakery and Confectionary Workers International Union of America, Local No. 37, American Federation of Labor, hereinafter called the "Bakery Union." By a vote of 52 to 15 the employees rejected representation by the Bakery Union. For a period of almost three years, there was no communication between the Bakery Union, or any other union, and the management and employees of Service.

On or about *February 13, 1952,* without notice to the management and employees of Service, in an apparent effort to force the production and maintenance employees of Service to join the Bakery Union and the driver employees of Service to join Bakery Drivers Local Union No. 276, American Federation of Labor, hereinafter called the "Drivers Union," the said Drivers Union with the support of the Bakery Union, the Los Angeles Food Council, the Joint Council of Teamsters' Union No. 42 and the Los Angeles Central Labor Council, commenced picketing, or threatened to picket, all of the sixteen retail food market customers of Service, including Thriftymart, Boys Valley Market No. 4 and Valley Stores No. 1 and No. 2, to induce the said retail customers to cease doing business with Service. The picketing, on occasion, was at the delivery entrances of the food markets; on other occasions, at the customer entrances. The placard carried by the pickets stated to the public that "Danish Maid

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Bakery products sold here are made and delivered by a bakery that is non-union and on the 'We do not patronize' list" of the five unions supporting the boycott. As a consequence of the picketing, and threats of picketing, all of the retail customers of Service did cease doing business with Service.

On the *18th day of February, 1952*, Service filed suit in the Los Angeles Superior Court against five unions, including the Bakery Union and the Drivers Union, and the retail food market customers of Service, wherein Service sought to prohibit the defendants therein from engaging in activities alleged to be in restraint of trade contrary to the California Cartwright Act (Cal. Bus. and Prof. Code, Sec. 16720, *et seq.*) by enjoining, among other activities, picketing of retail customers of Service.

On the *21st day of February, 1952*, Petitioners filed a charge before Respondent, National Labor Relations Board, hereinafter sometimes called "the Board," alleging that the same unions that were defendants in the State Court action were engaging in unfair labor practices, as defined in Section 8(b)(4)(A) of the Labor Management Relations Act of 1947, by inducing union members to refuse to make deliveries to the retail customers of Service for the purpose of compelling said customers to refuse to do business with Service.

On *April 3, 1952*, the Superior Court for Los Angeles County held that secondary picketing is contrary to the public policy of the State of California and issued a preliminary injunction enjoining the Bakery Union and the Drivers Union from:

> "1. Inducing or seeking or attempting to induce any person to refrain from purchasing plaintiff's

[Service's] merchandise by picketing plaintiff's customers or prospective customers.

"2. Stationing or maintaining any pickets at or about the place of business of any of plaintiff's customers or prospective customers or threatening to do the same."

On *May 14, 1952*, Respondent, National Labor Relations Board, issued a complaint against the Drivers Union alleging that said union had violated Sections 8(b)(1)(A), 8(b)(4)(A) and 8(b)(4)(B) of the Act, and sought a Federal District Court injunction against said union under the authority of Section 10 of the Act.

On the same date, *May 14, 1952*, Respondent, National Labor Relations Board, filed the instant suit for injunctive relief against Petitioners. This suit and the suit against the Drivers Union were consolidated for trial.

Respondent, National Labor Relations Board, alleges in the complaint for injunctive relief in this action that it is vested with exclusive jurisdiction to determine whether concerted activities by labor organizations which affect commerce constitute unfair labor practices under Section 8 of the Act or conduct permitted and guaranteed by Section 7 of the Act; that no state court has power to enjoin activity within the Board's exclusive jurisdiction; that Petitioners and their market customers are engaged in interstate commerce; that Service filed a restraint of trade suit in the state court against the Bakery Union and the Drivers Union, and also a charge before the Board alleging that an unfair labor practice under federal law had been committed by the same union; that the state court action sought to enjoin the identical union activity involved in the unfair labor practice charge,

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which activity is alleged to be within the exclusive jurisdiction of the Board.

Respondent, National Labor Relations Board, further alleges in this action that the Board concluded that the union conduct required restraint to only a limited degree, that is, restraint in the language of Section 8(b)(4)(A) of the Act; that the Board concluded that the picketing, and threats of picketing, insofar as they constituted an appeal to the public not to buy Service's goods and an appeal to the retail customers of Service not to sell Service's goods, constituted a guaranteed right under Section 7 of the Act; that the state court enjoined conduct found to be both lawful and unlawful under federal law by the Board; that the state court action invades the exclusive jurisdiction of the Board; that the Federal Act pre-empts the field of secondary picketing, permitting no state regulation; that the Board needs an injunction to prevent Petitioners from further irreparably invading the Board's exclusive jurisdiction and impairing the Congressional objective of a uniform national labor policy.

The prayer of the Board's complaint is for an injunction enjoining Petitioners from in any manner availing themselves of the state court injunction, and from taking any further proceedings in the state court action against the Bakery Union and the Drivers Union, and to require Petitioners to withdraw their state court action, and to request the state court to vacate its injunction.

On *June 2, 1952*, the United States District Court granted a preliminary injunction in favor of Respondent, National Labor Relations Board, and against the Drivers Union, enjoining said Drivers Union from violating Section 8(b)(4)(A) of the Act pending final adjudication

by the Board of the matters involved, and on the same date granted a preliminary injunction in this action in favor of Respondent, National Labor Relations Board, and against Petitioners, restraining Petitioners from in any manner availing themselves of the benefits of the preliminary injunction issued by the Superior Court for the County of Los Angeles and from taking any further proceedings in the state court action.

On the same date, *June 2, 1952,* Petitioners filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit from the order of the District Court granting Respondents a preliminary injunction against Petitioners.

Upon a petition for rehearing filed by Respondent, the Court of Appeals for the Ninth Circuit on May 12, 1953, affirmed the order of the District Court granting the preliminary injunction. The case is reported at 204 F. 2d 848.

Statement of Questions Presented.

Does the National Labor Relations Board have statutory authority to prosecute this action for an injunction?

Where secondary picketing activity of a labor organization violates both the Federal Act and state law, does the National Labor Relations Board have exclusive jurisdiction of such activity, or may a state court take jurisdiction to enjoin violations of state law?

Has the National Labor Relations Board alleged and proved a cause of action in equity?

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Reasons Relied Upon for Granting of Writ.

1. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States, and to permit such settlement by the Supreme Court, the Writ should be granted.

2. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

3. The questions involved in this case are of great importance. At issue is the right of the states to regulate under state law secondary boycott activity affecting interstate commerce. Statutes of more than forty states regulating secondary boycott activity are affected and will be rendered null and void as applied to interstate commerce if the decision of the Ninth Circuit Court of Appeals is established as the law of the land.

4. Other critical questions of federal supremacy are at issue, such as the power of a Federal District Court to enjoin proceedings in a state court at the request of the National Labor Relations Board. This action of the National Labor Relations Board is without precedent. The importance of resolving conflicts between federal and state jurisdiction has been so often enunciated by the Supreme Court as not to require citation of authority.

5. The question as to whether or not union activity which violates both the Federal Act and state law is within the exclusive jurisdiction of the National Labor Relations Board has never been determined by this Court. However, this Court has granted a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania in *Joseph Garner, et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776, et al.*, No. 773, June 15, 1953, ... U. S. ....., 97 L. Ed. (Adv.) p. 1062, where the same issue is made the basis of the petition.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Brief in support of this Petition presented herewith, Petitioners pray that this Petition be granted and that the aforesaid questions be determined by this Court upon the granting of a Writ of Certiorari herein.

Respectfully submitted,

CARL M. GOULD for
HILL, FARRER & BURRILL,
and
HYMAN SMITH,
Counsel for Petitioners.

Certificate of Counsel.

I, the undersigned, Carl M. Gould, Counsel for Petitioners herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

CARL M. GOULD

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IN THE

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October Term, 1953.

No.....

CAPITAL SERVICE, INC., a California corporation, doing business under the fictitious firm name and style of DANISH MAID BAKERY, and G. BRASHEARS, individually and as president of said corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The statements in the Petition for Writ of Certiorari presented herewith with regard to the paragraphs entitled "Jurisdiction," "Statutes Involved," "Statement of the Case," and "Statement of Questions Presented," are incorporated by reference thereto. This case is reported at 204 F. 2d 848.

Summary of Petitioners' Argument.

1. The National Labor Relations Board does not have statutory authority, express or implied, to prosecute this action for an injunction.

2. The union activity in this case had a dual purpose: (1) to coerce the employees of Petitioners in violation of their Section 7 rights under the federal Act; (2) to ille-

gally restrain the trade of Petitioners in violation of the California Cartwright Act. Under the authority of this Court's decision in the *Giboney* case, 336 U. S. 490, Petitioners filed suit in the state court to enjoin the unions from illegally restraining the trade of Petitioners in violation of California law. Respondent has successfully enjoined Petitioners from prosecuting their restraint of trade suit in the state court, the federal courts holding that Respondent has exclusive jurisdiction under Section 10(a) of the federal Act. The lower federal courts are in error in holding that Respondent has exclusive jurisdiction, for the reason that Section 10(a) of the Act is intended only to preclude a state administrative agency, *not a state court*, from taking jurisdiction under state law over conduct which amounts to an unfair labor practice under the federal Act.

3. The National Labor Relations Board has not alleged or proved a cause of action in equity for the following reasons:

(a) The Board has not alleged and proved irreparable injury which is clear and imminent;

(b) The Board has not brought itself within the provisions of Section 2283, Title 28, U. S. C.;

(c) The District Court abused its discretion in refusing to weigh the equities in the case under the theory that the Board was entitled to the injunction as a matter of right;

(d) The Federal District Court abused its discretion in refusing to apply the principle of the *Ledbetter Erection Company* case, 97 L. Ed. (Adv.) p. 127, which is designed to permit state court action to proceed to final decision in the state courts.

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ARGUMENT.

I.

The National Labor Relations Board Does Not Have Statutory Authority to Prosecute This Action for an Injunction.

Where Congress passes an act empowering administrative agencies to carry on governmental activity, the power of these agencies is circumscribed by the authority granted. *Stark v. Wickard*, 321 U. S. 288, 309, 88 L. Ed. 733, 748 (1943), and cases there cited; accord, *N. L. R. B. v. Highland Park Manufacturing Company*, 341 U. S. 322, 95 L. Ed. 969, 977 (1950).

Congress has not granted to the National Labor Relations Board authority to bring this action for injunction. The only authority granted the Board to obtain injunctions in the Federal District Court is found in Section 10 of the Act which empowers the Board to prevent any person from engaging in any unfair labor practice affecting commerce. The extent of the Board's power to prosecute actions for injunction, therefore, is limited to suits involving unfair labor practice charges, as defined in Section 8 of the Act. Petitioners are not charged with any unfair labor practice under Section 8 and it follows that the Board is without power to bring this action.

To imply power in the Board to bring this action is not warranted, as Petitioners' conduct, if unlawful, may be redressed under the Act itself. It has been the contention of the Board throughout this entire proceeding that

secondary picketing activity, which is not proscribed
Section 8 of the Act, is a guaranteed right under Secti
7 of the Act. If this contention of the Board is sou
the Petitioners are guilty of an unfair labor practice
successfully enjoining in the state court the exerci
of such a right. If the unions involved were aggrieved
the Petitioners' denial of their alleged rights under Se
tion 7 of the Act, the procedure to follow was for t
unions to file an unfair labor practice charge with t
Board. The provisions of Section 10 of the Act th
come into operation.

The Board cannot use its own initiative, however,
respect to charging unfair labor practices (*N. L. R.*
v. Hopwood Retinning Company, 98 F. 2d 97 (1938
accord, *Consumers Power Company v. N. L. R. B.,* 1
F. 2d 38 (1940)). Yet that is exactly what the Boa
has done indirectly in this action. There are innumeral
unfair labor practices that are not redressed for the reas
that no charge is filed with the Board. That affords
opportunity for the Board on its own initiative to ins
tute court action to remedy the situation, nor is it a ba
for the Board's action in this case, which action is witho
precedent. The Federal District Court erred in not d
missing this action on the ground that the National Lab
Relations Board does not have statutory authority
bring this action for injunction.

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II.

The National Labor Relations Board Does Not Have Exclusive Jurisdiction of Secondary Picketing Activity Which Violates Both the Federal Act and State Law, and a State Court Has Jurisdiction to Enjoin Violations of State Law.

Under long-established principles of federal supremacy, the states are not excluded from regulating concerns engaged in interstate commerce unless Congress has clearly manifested an intent to preclude state legislation, (*Napier v. Atlantic Coast Line Railroad Co.*, 272 U. S. 605, 71 L. Ed. 432, 438 (1926)), or the repugnance or conflict of state law with the federal law is so direct and positive that the two acts cannot be reconciled or consistently stand together. *Kelly v. Washington*, 302 U. S. 1, 82 L. Ed. 3, 10 (1937). No such Congressional intent and no such conflict exists between federal and state law involved in this case.

In the absence of an expressed Congressional intent, this Court has been faced on several occasions with the task of defining the area within which state regulations may operate as applied to companies engaged in interstate commerce. This Court has passed upon this question in some ten leading cases. Of these cases, five have upheld the validity of state action, and five have struck down state action as being in conflict with the provisions of Federal law guaranteeing and protecting labor union activities.

This Court has sustained the validity of state action in the labor relations field even though its application included activities within federal jurisdiction, in the following cases:

International Union U. A. W. v. W. E. R. B., 336 U. S. 245, 93 L. Ed. 651 (1949) (referred to as the *Briggs-Stratton* case);

Algoma Plywood & Veneer Co. v. W. E. R. B., 336 U. S. 301, 93 L. Ed. 691 (1949) (referred to as the *Algoma* case);

Allen-Bradley Local U. E. R. M. W. v. W. E. R. B., 315 U. S. 740, 86 L. Ed. 1154 (1941) (referred to as the *Allen-Bradley* case);

Lincoln Fed. L. U. v. Northwestern I & M Co., 149 Neb. 507, 31 N. W. 2d 477, affirmed 335 U. S. 525, 93 L. Ed. 212 (1948) (referred to as the *Lincoln* case);

Railway Mail Assn. v. Corsi, 326 U. S. 88, 89 L. Ed. 2072 (1944) (referred to as the *Railway Mail* case).

This Court has decided that state action must fall where it is in conflict with the federal legislation, in the following cases:

Hill v. Florida, 325 U. S. 538, 89 L. Ed. 1782 (1944);

Bethlehem Steel Co. v. N. Y. L. R. B., 330 U. S. 767, 91 L. Ed. 1234 (1947);

LaCross Telephone Corp. v. W. E. R. B., 336 U. S. 18, 93 L. Ed. 463 (1949);

Amalgamated Assn. v. W. E. R. B., 340 U. S. 383, 95 L. Ed. 364 (1951);

International Union v. O'Brien, 339 U. S. 454, 94 L. Ed. 978 (1950).

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The answer to the issues raised in the instant case may be found in the answer to the following question: Can the states of the United States today pass laws regulating secondary boycott activity affecting interstate commerce where they are not in conflict with federal legislation and federal policy? If the answer is yes, then the state courts can regulate secondary boycott activity under the doctrine of the *Hughes* case, 339 U. S. 460, 94 L. Ed. 985 (1950), and the action of the Los Angeles Superior Court was proper.

More than 40 states have laws regulating various phases of secondary boycott activities. In *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 86 L. Ed. 1143, 1148 (1942), this Court observed that in forbidding the conscription of neutrals into an industrial dispute, Texas represents the prevailing, and probably the unanimous, policy of the states. If the Board prevails in this action, statutes in these more than 40 states will be rendered null and void as applied to interstate commerce. Furthermore, the remaining states which do not have such statutes will be prohibited from passing legislation regulating secondary boycott activity. The State of Arizona, for example, which on November 4, 1952, voted to abolish all secondary boycott activity within the state, has engaged in futile and ineffectual action if the Board position is upheld.

Secondary picketing, involving as it does the conscription of neutrals into a labor dispute, breeds breaches of the peace and disturbances detrimental to the public interests. Congress in enacting the federal law was aware that the states have an interest in the problem and are acting to deal with it. It cannot be assumed that Congress intended to deny to the states the power to deal with

the causes as well as the consequences of this type of activity. If Wisconsin could validly regulate union activity to the extent that it did in the *Briggs-Stratton* case, certainly California is not encroaching upon federal labor policy by forbidding picketing of employers who have no "nexus" with the real dispute between the primary parties.

Recent state court decisions support Petitioners' position that the state courts may exercise jurisdiction in the field of labor relations under state law, even though the federal law is "applicable." See *Goodwin, Inc. v. Hagedorn*, 303 N. Y. 638, 101 N. E. 2d 697 (1951), aff'd on rehearing 102 N. E. 2d 833 (1951); *Ex parte Henry*, 147 Tex. 315, 215 S. W. 2d 588 (1950); *Kincaid Webber Motor Company v. Quinn*, 362 Mo. 368, 241 S. W. 2d 886 (1951); *Wortex Mills, Inc. v. Textile Workers Union*, 369 Pa. 359, 85 A. 2d 851 (1951); *Royal Cotton Mill Company, Inc. v. Textile Workers Union*, 234 N. C. 545, 67 S. E. 2d 755 (1951).

In *Sommer v. Metal Trades Council*, 40 A. C. 396, March 10, 1953, the California Supreme Court held that in a labor dispute affecting interstate commerce the federal law deprives the state court of jurisdiction to grant relief under state law only if the state law is inconsistent with the federal law. It is there held that, even though the labor activity is within the jurisdiction of the National Labor Relations Board, the state court nevertheless has power to enjoin labor activity under state law. In the *Sommer* case, *supra*, the dissenting members of the court relied heavily on the decision of the Ninth Circuit Court in this case, for the proposition that a state court has no jurisdiction to enjoin activities which are within the jurisdiction of the National Labor Relations

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Board. The decision of the Ninth Circuit Court in this case was, inferentially at least, rejected by the majority of the California Supreme Court.

In *Carpenters & Joiners Union v. Ritter's Cafe, supra,* 315 U. S. 722, 86 L. Ed. 1143 (1941), this Court held that a state may, consistently with the constitutional right of free speech, prohibit peaceful secondary picketing under a state restraint of trade statute. In *Giboney v. Empire Storage & Ice Co.,* 336 U. S. 490, 93 L. Ed. 834 (1949), this Court held that Missouri may enjoin peaceful secondary picketing which is carried on in violation of the state anti-trade restraint statute.

The doctrine that a state may restrain picketing for a purpose found to be unlawful under state law was affirmed in *Building Service E. I. U. v. Gazzam,* 339 U. S. 532, 93 L. Ed. 1045 (1950), and *International Brotherhood v. Hanke,* 339 U. S. 470, 94 L. Ed. 995 (1950).

In *Hughes v. Superior Court,* 339 U. S. 460, 94 L. Ed. 985 (1950), this Court upheld a state injunction based upon a rule of public policy derived not from a statute, but from common law principles, declaring that it is immaterial whether the state's labor policy is expressed by the state's judicial organ or by the legislature.

With the above cited cases expressly in mind, Petitioners filed an action in the state court seeking to enjoin the secondary picketing activity engaged in by the unions as being contrary to the public policy of the state under its restraint of trade statute.

Petitioners' state court action comes within the principles of the cases cited above, and the Los Angeles Superior Court had the constitutional power to enjoin sec-

ondary picketing held to be contrary to the public policy of the State of California.

The National Labor Relations Act has no application whatever in a matter involving no legitimate labor objective or labor dispute. There can be no unfair labor practice where there is no labor dispute. *S-M News Co. v. Simons*, 279 App. Div. 364, 21 Labor Cases 66775 (1952); compare *Mountain States Div. No. 17 v. Mountain States Telephone & Telegraph Co.*, 81 Fed. Supp. 397 (1948), aff'd 193 F. 2d 470 (1951).

In the *S-M News Co.* case, *supra*, an interstate employer brought an action in the state court alleging that the defendant union prevented, by work stoppages, the S-M News Company from transferring certain delivery routes from certain of its delivery agencies to other agencies because relatives of the union president had interests in the agencies to which such routes were previously assigned. The defendant union argued that the state court did not have jurisdiction of the action, that exclusive jurisdiction was vested in the National Labor Relations Board under the Labor Management Relations Act of 1947 for the reason that a reading of the complaint in the state court action disclosed that there was an unfair labor practice involved on the part of the union under Section 8 of that statute. The New York Appellate Court said:

> "Clearly the gravamen of the present complaint is that no labor activity is involved in defendant's action, but an unlawful attempt is being made by one connected with the union to use the power of the union for selfish and personal aggrandizement of individuals not connected with labor. If this is

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the case, then this is not a labor dispute at all and no labor practice is involved but the strength of labor is being misdirected to an activity in restraint of the freedom of contract by individuals who happen to be able to control and direct labor's power.

"The Taft-Hartley Act was never intended to be used as a cloak for such unlawful conduct. It was an act to regulate labor controversies, not one to aid individuals to commit extortionate or other unlawful acts.

". . . Plaintiff has presentely, at least, established that no such labor dispute is involved. The federal statute could have no application whatever in a matter involving no legitimate labor objective or labor controversy.

* * * * * * * *

". . . We think it clear that there is no repugnance or conflict here between the federal act cited and the exercise of jurisdiction by this court in these circumstances. There is no suggestion in the federal act that it has pre-empted the field in relation to the enjoining of unlawful conduct such as here complained of."

The *S-M News Co.* case, *supra,* is remarkably similar to the case at bar. The case stands for the proposition that the National Labor Relations Act is not applicable unless a bona fide labor dispute is involved. The case stands for the further proposition that a state court is not deprived of jurisdiction to grant injunctive relief even though a portion of the allegations of the complaint might, if considered alone, be considered to set forth an unfair labor practice as defined in the National Labor Relations Act. Directly in point is the statement of the

court that a state court is not deprived of jurisdiction to grant injunctive relief where no labor dispute is involved, since there can be no unfair labor practice under the federal Act where there is no labor dispute. Petitioners' complaint in the state court is based on an illegal restraint of Petitioners' trade under the state antitrust statute. The parties are different and the issues are different in the state action. It is based upon the proposition that there is no genuine labor dispute involved between Petitioners and the unions. If this is true, the state court has jurisdiction to grant injunctive relief, as the National Labor Relations Act is inapplicable.

The state court action is in its preliminary stages. No trial on the merits has been held. If and when a trial on the merits is held, we submit that the Superior Court will find that an illegal conspiracy exists to restrain Petitioners' trade, and that there is no bona fide labor dispute. Yes Respondent seeks to deny Petitioners the right to proceed in the state courts and prove that the activity of the unions was for an illegal object under state law. If Petitioners are permitted to prove this fact in the state action, namely, that no genuine labor dispute exists, the National Labor Relations Act is not applicable and Respondent has no jurisdiction.

Whether or not Respondent has jurisdiction in this case depends upon whether or not a bona fide labor dispute exists between the union and Petitioners. If the activities of the union have for their objective the illegal restraint of Petitioners' trade, a restraint of trade statute, either federal or state, is applicable, not a labor relations statute. Before the National Labor Relations Act is applicable so as to confer jurisdiction on the Board,

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the bona fide objective of the union must be in furtherance of some legitimate labor objective as defined in the federal Act. Petitioners have been denied their right to prove in the state court that the objective of the union activity was designed to illegally restrain the trade of Petitioners within the meaning of the California anti-trade statute.

Petitioners submit that they seek relief in the state court for activity which violates state law and not federal law, that the facts alleged in the state court action do not constitute a labor dispute under either state or federal law, and that, *since there is no labor dispute, the state court has exclusive jurisdiction of this matter.*

For the purpose of this suit, it may be assumed that Section 10(a) of the Act establishes that state labor relations boards may not take jurisdiction of unfair labor practice charges under the provisions of state labor relations acts which are identical to the federal Act. We are left with the problem of whether or not Section 10(a) precludes a *state court* from taking jurisdiction under state law, common or statutory, over conduct which amounts to an unfair labor practice under the federal Act. This Court has previously granted a petition for writ of certiorari in the case of *Joseph Garner, et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776, et al.*, No. 773, June 15, 1953, ... U. S. ....., 97 L. Ed. (Adv.) p. 1062, to determine this question. The argument that follows is drawn in part from Petro, Participation by the States in the Enforcement and Development of National Labor Policy, Notre Dame Lawyer, Vol. XXVIII (1952).

Section 10(a) of the Act provides as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

This section *does* say that the power of the Board to prevent the unfair labor practices listed in Section 8 is not to be affected by *any* other means of adjustment or prevention. But the section *does not* say that the Board is exclusively empowered to hear and decide all cases involving conduct which amounts to unfair labor practices listed in Section 8. The reason that it does not is that Section 10(a) was never intended to exclude state court proceedings. At the time that this section was written into the Wagner Act, the Act contained no restrictions on union conduct, and there was no state common or

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statutory law restraining employer conduct of the type prohibited in the Wagner Act. The section could not have been drafted for the purpose of excluding state court action, since there was no reason to believe that any state court would take any case involving Wagner Act unfair labor practices.

The language of the Section bears out this point. The words "prevent," "adjustment," and "prevention" are not words ordinarily used to preclude the normal activity of courts. This language indicates that the section was designed simply to insure that the Board would not be hampered by private agreements, or, by conduct of state administrative agencies.

In amending Section 10(a), the Eightieth Congress was concerned with two factors, both relating to state labor relations boards, not state courts: first, the decision of this Court in *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 330 U. S. 767, 91 L. Ed. 1234 (1947), emphasizing the possibility of ceding jurisdiction to state boards, and, second, the fact that state labor relations acts were less restrictive on labor unions than the Federal Act. The Eightieth Congress did not want to see its restrictions on union action avoided through the use of state agencies. That the Eightieth Congress was not intending to preclude state court action under state law by its amendment is shown by the fact that *there is no way in which the Board can cede jurisdiction to state courts.*

There is almost no discussion of precluding state court action in the Senate Reports. If Congress had intended to suspend the operation of the state police power in the field of labor-management relations, clear language could have been employed. Furthermore, it hardly seems likely that a "states-rights" Congress, such as the Eightieth Congress, intended to prohibit state court action under state law by passage of the amended Federal Act.

The Board has contended that if we are to have a uniform national labor policy, the Board's power must be exclusive. But how is the national labor policy frustrated or embarrassed, as in this case, where a state court enjoins secondary picketing which also violates the federal Act? An injunction is only what the Board must seek anyway under the mandate of the Act. If a state court gives damages for acts which the Board chooses to remedy in some other way, no one can say that the national labor policy has been frustrated by the difference in remedies. In the absence of repugnance or conflict between state court action under the state law and the Federal Act, there can be no frustration or embarrassment to the Board in administering a uniform national labor policy. We respectfully submit, therefore, that in the absence of direct and positive repugnance or conflict between state court action and federal law, the state courts are not excluded from regulating under state law labor relations affecting commerce.

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III.

The National Labor Relations Board Has Not Alleged or Proved a Cause of Action in Equity.

It is a well recognized principle of law that state action to enforce state laws, alleged to be in conflict with the Federal Constitution, may be enjoined by federal courts only to prevent irreparable injury which is clear and imminent. (*American Federation of Labor v. Watson*, 327 U. S. 582, 90 L. Ed. 873 (1946).) In the *Watson* case, *supra*, this Court said at 327 U. S. 582, 592, 90 L. Ed. 873, at 880:

> "But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. Douglas v. Jeannette, *supra* (319 U. S. pp. 162, 163, 87 L. ed. 1328, 1329, 63 S. Ct. 877, 882). The power of a court of equity to act is a discretionary one. Pennsylvania v. Williams, 294 U. S. 176, 185, 79 L. ed. 841, 847, 55 S. Ct. 380, 96 A. L. R. 1166. Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.' Douglas v. Jeannette, *supra* (319 U. S. p. 163, 87 L. ed. 1329, 63 S. Ct. 877, 882); Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 79 L. ed. 1322, 55 S. Ct. 678; DiGiovanni v. Camden F. Ins. Asso., 296 U. S. 64, 80 L. ed. 47, 56 S. Ct. 1; Watson v. Buck, 313 U. S. 387, 85 L. ed. 1416, 61 S. Ct. 962, 136 A. L. R. 1426."

It was held in the *Watson* case, *supra,* that, although the bill alleged facts presenting a case of irreparable injury which was clear and imminent, the Federal District Court should refrain from passing on the merits of the suit until the State law has been authoritatively construed by the state courts, retaining the bill until this has been done, where the constitutional issues may be modified or altogether eliminated by the state court's determination.

In *Ackerman v. International Longshoremen's and Warehousemen's Union,* 187 F. 2d 860 (9th C. C. A., 1951), it is held that a federal court will not interfere in a case where the proceedings are already pending in a state court; accord, *Alesna v. Rice,* 172 F. 2d 176 (9th C. C. A., 1949); *Davega-City Radio v. Boland,* 23 Fed. Supp. 969 (1938) (action to enjoin proceedings in a state court denied under Section 2283 of Title 28, U. S. C.); *United Electrical R. and M. W. of A. v. Westinghouse Electric Corporation,* 65 Fed. Supp. 420 (1946) (action to enjoin state court proceedings denied under Section 2283 of Title 28, U. S. C.).

The Board has contended throughout these proceedings that where a statutory injunction is sought, traditional equity principles are not applicable, and that the Board is entitled to an injunction as a matter of right. The short answer to this contention is that there is no such principle of law. (*Hecht Company v. Bowles,* 321 U. S. 321, 88 L. Ed. 754 (1944).) Furthermore, the Board is not seeking a statutory injunction in this action.

It is hornbook law that a court of equity, in the exercise of its sound discretion in granting or denying an injunction, must balance the convenience of the parties and possible injuries to them. The District Court found

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that the Board will be irreparably injured if a preliminary injunction does not issue for the reason that the Congressional objective of a uniform national labor policy will be frustrated. In *Pratt v. Stout*, 85 F. 2d 172 (1936), this type of injury to the Board was held to be inconsequential. Compared to the certain and substantial damage incurred by Petitioners through the loss of the protection afforded by the state court injunction, the damage to the Board is truly inconsequential. The District Court abused its discretion in refusing to weigh the equities and injuries to the respective parties under the theory that the Board was entitled to an injunction as a matter of right.

The decision of this Court in *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company*, ... U. S. ....., 97 L. Ed. (Adv.) p. 127, decided December 8, 1952, is also pertinent. In the *Ledbetter* case, *supra*, this Court held that the Supreme Court of the United States does not have jurisdiction to review a state court action granting a preliminary injunction enjoining secondary picketing and secondary boycott activity, even though the state action is alleged to be within the exclusive jurisdiction of the National Labor Relations Board. This Court held that the Supreme Court of the United States only has jurisdiction to review state court action when a final judgment or decree has been rendered by the highest court of the State. The Federal District Court abused its discretion in allowing the Board to circumvent the principle of the *Ledbetter* case by filing an action in the federal court to enjoin the interlocutory state court proceedings. The lower courts erred in upholding the contention of the Board that, al-

though the United States Supreme Court may not review a preliminary state court order if it is brought to the Supreme Court through the state courts, yet the Supreme Court may properly review the preliminary state court order if it is brought to the Supreme Court through the federal courts by the action of the Federal District Court enjoining the state court proceedings.

Conclusion.

It is respectfully submitted that this Petition for Writ of Certiorari be granted and that the Court settle, with finality by its judgment the uncertainty and conflict in the law which now exists.

Respectfully submitted,

/ CARL M. GOULD for
HILL, FARRER & BURRILL, and
HYMAN SMITH,
Attorneys for Petitioners.

Los Angeles, California, October, 1953.

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